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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No. 899

THE KANSAS TURNPIKE AUTHORITY,
Petitioner,

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

CLARENCE V. BECK,
Citizens National Bank Building,
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INDEX

Statement 1

Questions Presented 2

Argument 3

Question I. Do special and important reasons exist for the granting of a review on writ of certiorari in this case? 3

Question II. Is the Kansas Turnpike Authority a "citizen" within the meaning of the diversity of citizenship provisions of Section 1332, U.S.C.A., Title 28, or is the Kansas Turnpike Authority "one of the United States" within the meaning of the Eleventh Amendment to the Constitution of the United States? 4

Question III. Was there substantial evidence before the trial court to support the judgment rendered in this action? 27

Conclusion 30

Appendix—

Statutes of the State of Kansas—

68-2002, G.S., 1959 Supp. A1

68-2003, G.S., 1959 Supp. A1

68-2004, G.S., 1959 Supp. A2

68-2007, G.S., 1959 Supp. A3

68-2008, G.S., 1959 Supp. A3

68-2009, G.S., 1959 Supp. A4

68-2010, G.S., 1959 Supp. A5

68-2011, G.S., 1959 Supp. A5

68-2012, G.S., 1959 Supp. A5

68-2015, G.S., 1959 Supp. A5

68-2017, G.S., 1959 Supp. A6

68-2019, G.S., 1959 Supp. A6

68-2021, G.S., 1959 Supp. A6
68-2022, G.S., 1959 Supp. A7
68-2025, G.S., 1959 Supp. A7
74-2001, G.S. 1949 ..... A8
74-2006, G.S. 1949 ..... A8

TABLE OF CASES

Anderson Cattle Company v. *Kansas Turnpike Authority*, 180 Kan. 749, 308 P.2d 172 ..... 5, 12
Arnold v. *Coffey County Comm'rs*, 131 Kan. 343, 291 Pac. 762 14
Camden Interstate R. Co. v. *Catlettsburg*, Ky., (C.C.A. 1904) 129 Fed. 421 15
Cargile v. *New York Trust Co.*, (C.C.A.) 67 P.2d 585 16
City of Dearborn v. *Michigan Turnpike Authority*, 1955, 73 N.W.2d 344 25
Darby v. *L. G. DeFelice & Son*, 94 F. Supp. 535 ..... 9, 22
Deerhead Township v. *Fritz*, 152 Kan. 110, 102 P.2d 1035, at page 114 14
Dunnuck v. *Kansas Highway Commission*, 21 F. Supp. 882 5
Eikenberry v. *Township of Bazaar*, 22 Kan. 556 14
Fisher v. *Township*, 87 Kan. 674, 125 Pac. 94 14
Florida Turnpike Authority v. *Van Kirk*, 146 F. Supp. 364 26
Fowler v. *California Toll Bridge Authority*, 9 Cir., 128 F.2d 549 24
George Vang, Inc., v. *Ohio Turnpike Commission*, D.C., E.D. being Civil Action No. 4584 decided July 31, 1956 26
Guaranty Trust Co. v. *West Virginia Turnpike Comm.*, 109 F. Supp. 286 ..... 8, 23, 24
Harrison Construction Company v. *Ohio Turnpike Commission*, 272 F.2d 337 ..... 4, 18, 25
Herta v. *Kundson*, 8 Cir., 6 F.2d 812 21

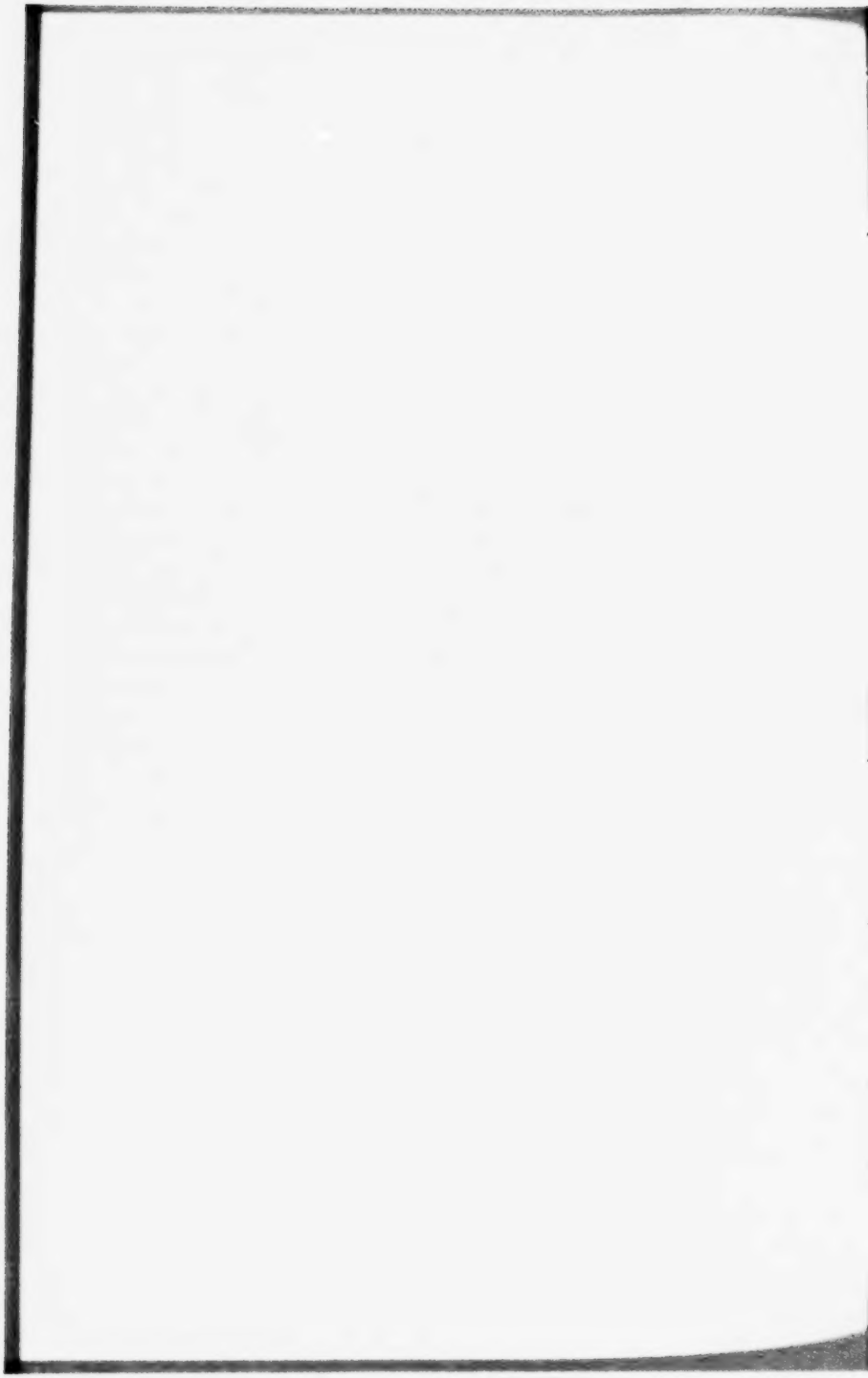
BLEED THROUGH POOR COPY

Hope Natural Gas Company v. *West Virginia Turnpike Commission*, (1958) 105 S.E.2d 630 25
Hopkins v. *Clemson Agricultural College of South Carolina*, 1911, 221 U.S. 636, 642, 31 S.Ct. 654, 55 L.Ed. 890 16
Hosterman v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323 5
Hunkin-Conkey Construction Co. v. *Pennsylvania Turnpike Commission*, 34 F. Supp. 26 (1940) 20, 21
Indiana State Toll Bridge Commission v. *Minor*, (1957) 236 Ind. 193, 200, 139 N.E.2d 445 25
Interstate Construction Co. v. *Regents of the University of Idaho*, D.C., 199 Fed. 309 21
Johnson-Greene Company et al. v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7816 decided December 4, 1957 25
Johnson v. *Noble*, (C.C.A.) 64 F.2d 396 15
Kansas City Bridge Co. v. *Alabama State Bridge Corp.*, 5 Cir., 59 F.2d 48 24
Keifer and Keifer v. *Reconstruction Finance Corporation*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 5
Larson v. *Domestic and Foreign Commerce Corp.*, 1949, 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 17
Linger v. *Pennsylvania Turnpike Commission*, 158 F. Supp. 900, D.C., W.D., Pa., 1958 ..... 16, 23
Lowes v. *Pennsylvania Turnpike Commission*, 125 F. Supp. 681 23
Masse v. *Pennsylvania Turnpike Commission*, D.C., E.D., Pa., 1958, 163 F. Supp. 510 23
Merrill v. *Inhabitants of Town of Gray*, (D.C. Maine) 37 F. Supp. 61 14
Minnesota v. *Northern Securities Co.*, 194 U.S. 48, 63, 24 S. Ct. 598, 48 L. Ed. 870 21
New Jersey Turnpike Authority v. *Parsons*, (1949) 69 A.2d 875, 879 25
Osborn v. *United States Bank*, 9 Wheat. 738 4

Palatka Water Works Co. v. *City of Palatka*, Fla. (9 C.C.A. 1903), 127 Fed. 161 15
Pennsylvania Turnpike Commission v. *Welsh*, 3 Cir. 1951, 188 F.2d 447, 450 ..... 16, 17
People v. *Illinois State Toll Highway Commission*, (1954) 3 Ill.2d 218, 120 N.E.2d 35 25
Pfeferle v. *Lyon County*, 39 Kan. 432, 18 Pac. 506, at page 436 12
Postal Telegraph Cable Co. v. *Alabama*, 155 U.S. 482, 487, 15 S. Ct. 192, 194, 39 L. Ed. 231 21
S. J. Groves & Sons Company v. *West Virginia Turnpike Commission*, (D.C., S.D., W.Va., 1958) 164 F. Supp. 816, 817 25
Sloan Shipyards Corporation v. *United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 567, 42 S. Ct. 386, 388, 66 L. Ed. 762 5
Smith v. *Higgins*, 149 Kan. 477, 87 P.2d 544, at page 479 ..... 13, 14
Smith v. *Reeves*, 178 U.S. 436 19
South Carolina Public Service Authority v. *New York Casualty Co.*, 74 F. Supp. 831 26
Stamey v. *Kansas Highway Commission*, 76 F. Supp. 946 5
State ex rel. Highway Commission v. *Bates*, 317 Mo. 696, 296 S.W. 418 25
State ex rel. v. *State Highway Commission*, 138 Kan. 913 ..... 10, 12
State Highway Commission v. *Utah Construction Company*, 273 U.S. 194, at 200, 49 S. Ct. 104, 73 L. Ed. 262 21
State Highway Commission v. *Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 15-16, 19, 20
State of Minnesota v. *Hitchcock*, 1902, 185 U.S. 373, 386, 22 S. Ct. 650, 46 L. Ed. 954 17
State of Oklahoma v. *Oklahoma Natural Gas Corp.*, 83 F.2d 986 (1936) 15
State v. *State Highway Commission*, 139 Kan., Page 394 10

BLEED THROUGH POOR COPY

Taylor v. *New Jersey Highway Authority*, (1956) 22 N.J. 454, 126 A.2d 313, 322 25
Thomas v. *Ellis County*, 91 Kan. 443, at page 445 13
United States v. *Lee*, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171 5
Utah Construction Co. v. *State Highway Commission*, D.C., 16 F.2d 322 21
Wheeler v. *City of Chicago*, (C.C.A. 1895) 68 Fed. 526 15
Wommack v. *Lesh*, 180 Kan. 548, 305 P.2d 854 13



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EDWIN JOHN ABRAMSON and EMMETT JOHNS,
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Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

STATEMENT.

Brief reference will be made to the statements set forth under the heading "Statement" contained in the petition filed herein by Petitioner.

Petitioner states that the Kansas Turnpike Authority was created "as an instrumentality and governmental department of the State of Kansas * * *". This is not a correct statement of law although such a statement might

properly be made if offered for the purposes of argument. The act creating the Kansas Turnpike Authority does not designate it as a "governmental department." In fact, it specifically creates a separate and distinct "body politic and corporate" rather than a department of the State of Kansas (See 68-2003, G.S., 1959 Supp., App. A1).

Petitioner also states that the Tenth Circuit Court of Appeals held, among other things, "That the rains which destroyed the original compaction were unusual rains." A comment is then added in the footnotes that this was a finding of fact made in the first instance by the Circuit Court.

We submit that no such "finding of fact" was made by the Circuit Court. The Circuit Court, in discussing Section 18 of the Standard Specifications, commented that no one contended the rains which fell from September 22 to October 5 were ordinary for that time and place. It is patently erroneous to contend such comment constitutes or was intended to constitute a finding of fact. Furthermore, such comment had no bearing upon the decision rendered.

QUESTIONS PRESENTED.

Attention is first invited to the two statements set forth by petitioner under this heading.

We suggest that Petitioner's statement of the first question clearly demonstrates the unsoundness of Petitioner's position in this law suit. This statement overlooks the clear language of the Eleventh Amendment to the Constitution of the United States. The prohibition with which we are concerned is not an action against "state governmental agencies carrying on essential governmental func-

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tions" but rather actions "against one of the United States."

In other words, the controversy is whether the Kansas Turnpike Authority is the State of Kansas—not whether this action is against some other agency bearing a relationship to the State of Kansas.

Although we do not feel that the issue presented by Petitioner in the second question is such a question as will command the attention of the United States Supreme Court we do point out that the question is argumentative as set forth by Petitioner and assumes as true several matters that were in dispute during the trial of this action, and which were determined in favor of Respondent by virtue of the judgment rendered by the trial court and affirmed by the Tenth Circuit Court of Appeals.

ARGUMENT.

QUESTION I.

Do special and important reasons exist for the granting of a review on writ of certiorari in this case?

We have carefully examined the provisions of Section 5, Rule 38 of the Supreme Court Rules setting forth the situations in which a writ of certiorari will be granted.

We note the provisions that the writ will be granted only when there are special and important reasons therefor.

We also note the character of reasons set forth in Section 5(b) of this rule.

We submit that no special nor important reasons exist in this case and that none of the situations spelled out in Section 5(b) are here present.

The decision in this case is not in conflict with the decisions of any Circuit Court of Appeals. In fact this decision of the Tenth Circuit Court of Appeals is squarely in point with the case of *Harrison Construction Company* v. *Ohio Turnpike Commission,* No. 13,779 U. S. Circuit Court of Appeals for the Sixth Circuit, decided December 3, 1959, and cited by Petitioner as 272 F.2d 337. Rarely do we find a case so completely indistinguishable as is true of the *Harrison Construction Company* v. *Ohio Turnpike Commission* case and the case at bar.

Nor does the decision in this case decide an important question of local law in a way probably in conflict with applicable local decisions. Although several decisions of the Kansas Supreme Court have discussed the act creating the Kansas Turnpike Authority none of these decisions has decided, or even given consideration to, the question of whether the Kansas Turnpike Authority is the State of Kansas and thereby within the provisions of the Eleventh Amendment to the Constitution of the United States.

QUESTION II.

Is the Kansas Turnpike Authority a "citizen" within the meaning of the diversity of citizenship provisions of Section 1332, U.S.C.A., Title 28, or is the Kansas Turnpike Authority "one of the United States" within the meaning of the Eleventh Amendment to the Constitution of the United States?

A brief statement of the applicable rule is as follows:

The State of Kansas, and the State alone, not the agents, instrumentalities or subdivisions of the State, is held *not* to be a "citizen" within the meaning of Section 32, 28 U.S.C.A.

Osborn v. *United States Bank,* 9 Wheat. 738.

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United States v. *Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171.

Sloan Shipyards Corporation v. *United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 567, 42 S.Ct. 386, 388, 66 L.Ed. 762.

Keifer and Keifer v. *Reconstruction Finance Corporation*, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784.

The Authority appears to base its argument primarily upon two points.

1. That the *Kansas State Highway Commission* has been judicially determined to be the State of Kansas, and not a "citizen" within the meaning of Section 1332, 28 U.S.C.A. (*Stamey* v. *Kansas Highway Commission*, 76 F. Supp. 946; *Dunnuck* v. *Kansas Highway Commission*, 21 F. Supp. 882); therefore, they contend, the *Kansas Turnpike Authority* is not a "citizen."

2. That the Supreme Court of Kansas has held that the Kansas Turnpike Authority is an *arm* of the State of Kansas (*Hosterman* v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323; *Anderson Cattle Company* v. *Kansas Turnpike Authority*, 180 Kan. 749, 308 P.2d 172); therefore, they contend, it is not a "citizen."

We shall consider these points in the order set out above.

An examination of the provisions of the Kansas Turnpike Act discloses the following:

(a) Although it has been established (*Stamey* v. *State Highway Commission of Kansas*, 76 F. Supp. 946, *Dunnuck* v. *Kansas State Highway Commission*, 21 F. Supp. 882) that the State Highway Commission of Kansas is the State of Kansas, the Kansas Turnpike Authority

is required to repay the State Highway Commission for all money and services received from it (G.S., 1957 Supp., 68-2021 and 2022, App. A6-A7). And the State Highway Commission and Kansas Turnpike Authority are authorized to contract with each other for personnel, equipment and engineering work (G.S., 1957 Supp., 68-2021, App. A6).

(b) The Authority is authorized to issue revenue bonds "of the Authority," not of the State of Kansas, and such bonds must be paid exclusively from the revenues of the Authority and not from funds of the State of Kansas (G.S., 1957 Supp., 68-2002, 2004 and 2007, App. A1, A2, A3).

(c) Bonds issued by the Authority shall not constitute a debt of the State or a pledge of the faith and credit of the State (G.S., 1957 Supp., 68-2008, App. A3).

(d) The turnpike could not be constructed until it was determined that the project would be entirely self-liquidating and could be financed wholly through the investment of *private funds* (G.S., 1957 Supp., 68-2002, App. A1).

(e) The Authority is a corporation, created as a body politic and corporate, and has been granted many of the powers granted by statute to private corporations such as the power to adopt by laws, adopt an official seal (rather than to use the seal of the State of Kansas), and to sue and be sued in its own name, plead and be impleaded (G.S., 1957 Supp., 68-2003, 2004, 2007, App. A1, A2, A3).

(f) The Authority has exclusive control over the amount of tolls to be charged, the employment of all employees and agents, and is authorized to make and enter into all contracts and agreements necessary to the exercise of its powers; and in the exercise of these powers the

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Authority is not subject to the supervision or regulation of any commission, board, bureau, official or agency of the State of Kansas (G.S., 1957 Supp., 68-2004, 2009, 2019, App. A2, A4, A6).

(g) The Authority is authorized to acquire, hold and dispose of real and personal property (G.S., 1957 Supp., 68-2004, App. A2).

(h) The bonds of the Authority may be issued without obtaining the consent of any department, division, commission, board, bureau or agency of the State, and without regard to the general bond laws of Kansas (G.S., 1957 Supp., 68-2007, 2019, App. A3, A6).

(i) Revenues received by the Authority "shall be deemed trust funds" for the benefit of the bondholders, *and do not become State funds* (G.S., 1957 Supp., 68-2011, App. A5).

(j) The Authority is authorized to enter into a trust agreement with a commercial trust company for the protection of the bondholders who furnish the private capital, and such bondholders are authorized to bring an action under the trust agreement to protect their interest (G.S., 1957 Supp., 68-2010, 2012, App. A5).

(k) The Authority is required *to provide and pay for* the policing of the turnpike (G.S., 1957 Supp., 68-2025, App. A7).

(l) The liability of the Authority for its acts is extended beyond the rules of common law negligence (G.S., 1957 Supp., 68-2015, App. A5).

These provisions demonstrate beyond question that the Legislature did not want the State of Kansas to construct the proposed turnpike. It is seen that there was a

studied effort to divorce the Authority from the State of Kansas in every possible way.

This position was stated as follows in *Guaranty Trust Co. v. West Virginia Turnpike Comm.*, 109 F. Supp. 286, where it was said:

> "By the West Virginia act, as by the Pennsylvania act, the Legislature clearly intended to divorce the Turnpike Commission as fully as possible from any identity with the State, while giving it all the functions which are necessary and essential to the accomplishment of its purposes."

If the State of Kansas desired to construct and operate a turnpike, why did it not do so through the state highway commission, the department of the State Government created for the sole purpose of constructing, operating and maintaining the highways of Kansas? We think it is clear that the State of Kansas did not want in any manner or to any degree to incur any responsibility or financial liability for this project. It thought the building of the turnpike advisable and in the best interests of the people of Kansas, if, but only if, it could be accomplished by a separate, distinct, corporate entity. The Legislature was willing to create such an entity and made concessions with respect to the payment of taxes. *In doing so, however, the Legislature saturated its enactment with frequent and unmistakable guards against the involvement of the State of Kansas.*

What similarity is there, therefore, between the Authority the Kansas Highway Commission?

The State Highway Commission of Kansas is created in the same manner and with the same general powers as any other commission of Kansas (G.S. 1949, 74-2001, App. A8). It is strictly a department of the government

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of Kansas. It is financed entirely by funds provided by taxation. The Legislature of Kansas appropriates every penny that the Commission spends. Its funds are public funds and are in the custody and control of the State Treasurer until the Kansas Legislature directs a transfer of these funds, whereas the funds of the Authority are maintained in banks designated by the Authority with the approval of the trustee. The Highway Commission is governed by the budget laws and cash basis laws of Kansas whereas the trust agreement controls the spending procedure of the Authority. The selection of the employees of the Authority is solely within the judgment and discretion of the governing body of the Authority, whereas the State Highway Commission must abide by the civil service procedures applicable to all state employees. The Attorney General of Kansas provides the Highway Commission with its attorney, whereas the Authority engages a private attorney (G.S. 1949, 74-2006, App. A8).

This list of differences between the Highway Commission of Kansas and the Authority could be extended but no purpose would be served by doing so. *It is crystal clear that in creating the Authority, the State of Kansas took every conceivable precaution to make certain it did not get into the turnpike business.*

It has been pointed out that the Turnpike Act exempts the Authority from the payment of taxes. We answer this by saying that if the Legislature considered or intended that the property acquired by the Authority was to become the property of the State of Kansas, it would not have been necessary to take legislative action to create the exemption. It was stated in *Darby* v. *L. G. DeFelice & Son*, 94 F. Supp. 535:

"Had the State Legislature regarded the Commission as the Commonwealth itself, it would have been utterly superfluous to give an express tax exemption."

The Court, in *State ex rel.* v. *State Highway Commission*, 138 Kan. 913, in describing the Highway Commission of Kansas, stated: "The state highway commission is therefore acting for the state in all of its activities authorized by statute for the construction and maintenance of state highways. The funds which it uses for that purpose are *state funds, and the warrants it draws on the fund are state warrants*, payable, however, from the fund, and are general as they apply to this fund." (Emphasis added).

We believe it fair to conclude that a comparison of the Highway Commission of Kansas and the Authority demonstrates persuasively the clear and controlling differences and dissimilarity between these two bodies.

Petitioner attempts to nullify the effect of the many sharp and distinguishing differences between the Kansas State Highway Commission and the Kansas Turnpike Authority by asserting that the funds used to support the Kansas State Highway Commission are not public funds, and are not appropriated by the Kansas Legislature.

These funds are, of course, state funds or public funds. They are raised by special taxes levied by the state legislature on motor vehicles and motor fuels and can be used only for the purpose of constructing a state system of public highways (*State* v. *State Highway Commission*, 139 Kan.. Page 394; *State* v. *State Highway Commission, supra*).

The funds so raised are then deposited with the State Treasurer of Kansas and remain with him until they are appropriated by the Kansas Legislature.

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As an example of the manner in which State Highway funds are appropriated, attention is called to Chapter 15, Laws of Kansas, 1959 (which was the last general session of the Kansas Legislature). This act is entitled "An Act making appropriations for the fiscal year 1960 for the operation, maintenance, support and functioning of activities and for improvement of the state highway commission; authorizing the fixing of salaries; restricting the expenditures of certain funds and authorizing appeals connected therewith; and reappropriating unencumbered balances as of June 30, 1959, for the fiscal year ending June 30, 1960."

It then continues: "Section 1. There is hereby appropriated out of the following special revenue funds * * *" and then section 2 sets forth the appropriations to the "State Highway Commission" for each of the various functions of the State Highway Commission.

See also Section 33, Chapter 11, Laws of Kansas, 1959, whereby the legislature increases the limitation of the total expenditures for the motor vehicle registration activity of the State Highway Commission, and specifies the amounts that can be spent by the highway commission for salary, wages and other operating expenses in connection with the motor vehicle registration. See Chapter 40, Laws of Kansas, 1959, directing the State Treasurer to transfer funds from the Highway Fund to the General Fund for cost of operation of the Motor Vehicle Reciprocity Commission.

There are numerous other instances in which the Kansas Legislature has appropriated funds from the Highway Fund for use by the State Highway Commission. In fact, we know of no instance in which highway funds have been spent by the State Highway Commission without such funds having first been appropriated by the Kansas Legislature.

The Authority then points to certain language used by our Supreme Court (which is actually dictum) and concludes that this language determines that the Authority is the State of Kansas (*Anderson Cattle Co.* v. *Kansas Turnpike Authority, supra; State ex rel.* v. *Kansas Turnpike Authority, supra*).

In each of these cases, the Kansas Supreme Court used the term "arm" of the State in referring to the Authority. In neither case did our Court judicially determine that the Authority was an "arm" of the State. The Court merely stated in one of the cases that the Legislature had power to create an "arm of the State", and in the other case a somewhat similar reference was made to the Authority.

It apparently is the use of the term "arm of the State" that renders comfort to the Petitioner. There is, however, no such comfort to be found from the use of this term.

The Petitioner also points to the legislative language describing the Authority as having been "created a body politic and corporate" and "constituted a public instrumentality".

If we were to agree that the Authority was an "arm of the State" and a "public instrumentality" it would not be of help to the Petitioner. The Supreme Court of Kansas has consistently held throughout its existence that the counties, cities, drainage districts and townships of Kansas *are political subdivisions of the State of Kansas, are instrumentalities of the State government, and are arms of the State.*

The Supreme Court of Kansas said in *Pfeferle* v. *Lyon County*, 39 Kan. 432, 18 Pac. 506, at page 436:

> "Counties are principally mere *political subdivisions of the state, mere instrumentalities of the state*

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> *government,* brought into existence merely for the purpose of aiding and assisting the state in promoting justice, in preserving peace, quiet and good order in the state, and of promoting the welfare and happiness of the citizens thereof; * * *." (Emphasis added).

A county was defined as an *arm of the state* government in 20 C.J.S. 754:

> "A county is but an agency or *arm* of the state government, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state, and as a matter of public convenience in the administration of the government. It is generally a subordinate part of the sovereignty of the state itself, and is not an independent governmental entity." (Emphasis added).

A recent Kansas case defining a county as an *arm* of the state is *Wommack* v. *Lesh,* 180 Kan. 548, 305 P.2d 854, where it was said:

> "Furthermore, it is well settled that a county is an *arm or agent of the state,* set up to perform certain governmental and political functions as such; * * *" (Emphasis added).

Also see *Smith* v. *Higgins,* 149 Kan. 477, 87 P.2d 544, at page 479:

> "It is an *arm and agent* of the state set up to perform certain governmental and political functions." (Emphasis added).

In *Thomas* v. *Ellis County,* 91 Kan. 443, at page 445, the Court said:

> "* * * counties are mere auxiliary agents of the state." (Emphasis added).

A township is likewise an *agency of the state* created by the state.

See *Deerhead Township* v. *Fritz*, 152 Kan. 110, 102 P.2d 1035, at page 114:

> "A township is a political subdivision of the state. It is well established that being an *arm of the state*, it is not liable in actions for tort unless such liability is clearly imposed by statute (Smith v. Higgins, 149 Kan. 477, 479, 87 P.2d 544, and cases there cited; Eikenberry v. Township of Bazaar, 22 Kan. 556; Fisher v. Township, 87 Kan. 674, 125 Pac. 94; Arnold v. Coffey County Comm'rs, 131 Kan. 343, 291 Pac. 762)." (Emphasis added).

The language of Section 3 of the Kansas Turnpike Authority Act, creating the Authority as "a body politic and corporate" and further providing in Section 4 that the Authority may "sue and be sued in its own name, plead and implead and make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act," *corresponds and is similar to the creation of counties, townships and cities by the legislature of the State as separate corporate entities performing duties as governmental instrumentalities.*

Counties are subject to suit in the federal courts upon their contracts.

A township is subject to suit upon its contracts in federal courts and such courts have jurisdiction of suits against the township upon its contracts.

> *Merrill* v. *Inhabitants of Town of Gray*, (D.C., Maine) 37 F. Supp. 61.

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A city is subject to suit upon its contracts in the federal courts and the federal courts have jurisdiction of actions on contracts against a city.

Wheeler v. *City of Chicago,* (C.C.A. 1895), 68 Fed. 526.

Palatka Water Works Co. v. *City of Palatka,* Fla. (9 C.C.A. 1903), 127 Fed. 161.

Camden Interstate R. Co. v. *Catlettsburg,* Ky. (C.C.A. 1904), 129 Fed. 421.

3.52 Encyclopedia of Federal Procedures, Vol. 2, p. 256; reads in part as follows:

> "Though a state is not regarded as a citizen within the purview of the removal acts, it is otherwise with municipal or political corporations. These are organized under the laws of the state for political purposes and come within the rule as to private corporations, and, being like the latter created by the laws of the state, are for purposes of removal citizens of that state. A county, being a municipality of the state, is a citizen of the state within the meaning of the Act. The same is true of a school district, which is a political subdivision of the state and a body corporate or quasi-corporate, authorized by the laws creating it to contract and sue in its own name."

The Tenth Circuit in the case of *State of Oklahoma* v. *Oklahoma Natural Gas Corp.*, 83 F.2d 986 (1936), in holding that a case was properly removed to the Federal Court passed upon the citizenship of the City of Tulsa. The Court said, l.c. 988:

> "In order to authorize removal on the ground of diverse citizenship alone, all parties on one side, except mere nominal parties, must be citizens of a different state from all parties on the other side. Johnson v. Noble, (C.C.A.) 64 F.2d 396. And a state is not a citizen for the purpose of constituting the requisite diversity. State Highway Commission v. Utah Con-

> struction Co., 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262; Ex parte State of Oklahoma, (C.C.A.) 37 F.2d 862, Cargile v. New York Trust Co., (C.C.A.) 67 P.2d 585. *But a municipal subdivision of the state, such as a county, city, town, or school district, having a separate corporate entity, is a citizen for that purpose.*" (Emphasis added).

We have demonstrated that the designation of the Authority as an "arm of the state" and "a public instrumentality" is not of help to the Authority in this action. *It places the Authority in the same category with counties, cities, townships, drainage districts, and school districts, all of which are "arms of the state" and "public instrumentalities", and all of which are "citizens" within the diversity of citizenship provisions of the federal code.*

The controlling consideration in determining whether the Authority is the State of Kansas is: *who is the real party in interest in this action?*

Although the rule of law has been stated many times by courts throughout the United States, a recent statement appears in *Linger* v. *Pennsylvania Turnpike Commission,* 158 F. Supp. 900, D.C. W.D. Pa. 1958, where it was said:

> "Judge Hastie has noted in Pennsylvania Turnpike Commission v. Welsh, 3 Cir. 1951, 188 F.2d 447, 450, that the Eleventh Amendment's prohibition of suits against the state extends to situations where the state, though not the party named, is the real party in interest. Hopkins v. Clemson Agricultural College of South Carolina, 1911, 221 U.S. 636, 642, 31 S.Ct. 654, 55 L.Ed. 890. And whether the state rather than its instrumentality is the real party in interest may be determined by analysis of the various attributes and limitations with which the latter has been endowed.

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Pennsylvania Turnpike Commission v. Welsh, supra; cf. 81 C.J.S. states § 131 (1953)."

* * *

"One of the crucial questions involved in determining whether the state is the real party in interest is whether the relief sought is relief against the sovereign. Cf. State of Minnesota v. Hitchcock, 1902, 185 U.S. 373, 386, 22 S. Ct. 650, 46 L.Ed. 954; Larson v. Domestic and Foreign Commerce Corp., 1949, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L. Ed. 1628. The plaintiff seeks a judgment for money damages and a judgment if entered will bind only the Pennsylvania Turnpike Commission. The Commonwealth of Pennsylvania has by statute insulated its treasury from the obligations of the Turnpike Commission."

* * *

"The Commonwealth obviously has an interest in the Turnpike. But its interest is *prospective*. It has chosen to delegate governmental power to an instrumentality which exercises independent authority and has independent financial responsibility. *The Commission and not the state has a direct and independent interest in the result of this action.*" (Emphasis added).

As stated in the above opinion, the interest of the State of Kansas in the outcome of this legislation is *prospective*. The parties principally concerned—those who have the real interest in the outcome of this lawsuit—are the corporate Turnpike Authority and those who have invested their private funds in the bonds of the Authority. It is true that at some distant time the Turnpike *might* become a part of the State Highway System of Kansas. Section 17 of the Turnpike Act (G.S., 1957 Supp., 68-2017, App. A6), provides that at such time as all indebtedness of the project has been provided for "such project, *if then in good condition and repair*, shall become a part of the state highway system and shall thereafter be maintained by the State Highway Commission." (Emphasis added).

Such *prospective* interest that the State of Kansas may have in the turnpike is dependent upon two things: first, the turnpike must prove to be sufficiently profitable that it will produce adequate revenue with which to pay the cost of operation and maintenance, and sufficient with which to pay the principal and interest on the bonds held by the private investors; and secondly, that when those conditions have been met, the turnpike itself must then be in good condition and repair.

It is perhaps true that the State has an interest of sorts but we are reminded that not one penny of any judgment rendered against the Authority and paid by it will be paid from the funds of the State of Kansas. *We readily see that the real party in interest is the Authority and its investors.* It is not enough that the State of Kansas may have some future interest. *It must be the real party in interest at the present time.*

The "real party in interest rule" was discussed in *Harrison Construction Company* v. *Ohio Turnpike Commission, supra,* as follows: "It is apparent that the Legislature very carefully immunized the treasury of the state from any obligations whatever arising out of the creation of the turnpike commission or any projects which it might undertake.

The question as to whether or not the state is the real party in interest must be 'determined by the essential nature and effect of the proceeding as it appears from the entire record.'

* * *

This action will not and cannot in any way affect the Treasury of the State of Ohio. That is a test of whether or not a suit is against the state. In *Ford Motor Co.* v. *Department of Treasury of Indiana et al, supra,* the Court said at

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p. 463, 'The action is against the state's department of treasury,' and at p. 464, '*And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.*'"

In *Smith* v. *Reeves*, 178 U.S. 436, it was held that the suit was one against the State of California. At pp. 438-9 it was said, "Although the State, as such, is not made a party defendant, the suit is against one of its officers as Treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint." (Emphasis added).

State Highway Commission v. *Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262, was cited by the Authority in support of their position. This case is clearly distinguishable. Here the contract involved in the action was actually with the State of Utah and the State itself was directly and immediately obligated. Any judgment rendered by the Court would have been paid by the State of Utah from public funds. The Court stated:

> "* * * the Commission is the sole defendant, *it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it.* In that event, it will be entirely optional with the State as to what, if anything, it will do in the premises. * * *" (Emphasis added).

Certainly that is not the situation in the case at bar.

This case was also distinguished in *Harrison Construction Company* v. *Utah Turnpike Commission, supra,* where it was said:

> "*State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, is cited as the leading case in support of appellee's contention. This case is readily distinguishable from the pending case. The highway fund was in the custody and keeping of the state treasurer and all roads constructed were financed from the state highway fund at the expense of the state. At p. 199, the Court said, 'The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and *obligated herself thereby.* Neither the Commission nor any of its members assumed any direct or personal responsibility. * * * *The Commission was* but the arm or alter ego of the State *with no funds* or ability to respond in damages. (Emphasis added.) Applying the basic test of the Ford case above cited, it is apparent that the action was against the State of Wyoming."

A case on all fours with the one at bar is *Hunkin-Conkey Construction Co.* v. *Pennsylvania Turnpike Commission,* 34 F. Supp. 26 (1940), where it was held that the Pennsylvania Turnpike Commission was distinct and separate from the state and was a citizen thereof for the purpose of establishing federal jurisdiction based upon diversity of citizenship. The Court said, l.c. 27:

> "The Eleventh Amendment provides that 'the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' This amendment has frequently been before the courts and it is well settled that the immunity therein granted may be waived by the State. In this case, the Commission is authorized to

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sue and be sued. This general provision constitutes a waiver by the State, if the State is the real party in interest, of its immunity from suit. Utah Construction Co. v. State Highway Commission, D.C., 16 F.2d 322; Interstate Construction Co. v. Regents of the University of Idaho, D.C., 199 F. 309; Hertz v. Knudson, 8 Cir., 6 F.2d 812. However, as shall be shown later, it is my conclusion that the State is not the real party defendant."

"The basis for jurisdiction of this court relied upon by plaintiff, aside from the amount in controversy, is the alleged diversity of citizenship of the parties. If the Commission is not a legal entity distinct from the State, the motion to dismiss must be granted, for 'A state is not a citizen. And, under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States.' Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487, 15 S. Ct. 192, 194, 39 L. Ed. 231; Minnesota v. Northern Securities Co., 194 U.S. 48, 63, 24 S. Ct. 598, 48 L. Ed. 870; State Highway Commission v. Utah Construction Company, 273 U.S. 194, at 200, 49 S. Ct. 104, 73 L. Ed. 262."

The Court after pointing out that the Act creating the commission constituted it "an instrumentality of the Commonwealth and the exercise of its powers * * * shall be deemed and held to be an essential governmental function of the Commonwealth," said l.c. 28:

"This provision, if taken alone, sheds little light upon the question of whether or not the Commission is in fact the alter ego of the State. However, the other provisions of the act, when considered in conjunction with this section, clearly indicate that the

Commission is distinct and separate from the State and is in reality a citizen thereof. *The act provides that the entire cost of the turnpike shall be paid in the first instance from a fund which is to be raised by the issuance and sale of bonds,* and that the 'turnpike revenue bonds issued under the provisions of this act shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth, but such bonds shall be payable exclusively from the fund herein provided therefor from tolls', Section 2, 36 P.S. Pa. § 652b; that *the Commission shall have the power to enter into contracts, take title to property, employ engineers, architects, inspectors, and attorneys* and such other employees' as may be necessary in its judgment, and fix their compensation; § 4 (subject to the proviso that all contracts and agreements relating to the construction of the turnpike must be approved by the Department of Highways and the construction shall be under the supervision of the Department of Highways); that, upon completion of the turnpike, the Commission shall fix the amount of the tolls and employ men to collect them and provide for the maintenance of the turnpike; that, *upon retirement of the bonds* or provision therefor, the Commission shall be dissolved *and the turnpike shall become a part of the system of state highways.*"

"From the provisions of the act, as above outlined, it is clear that the Commonwealth of Pennsylvania has so divorced the defendant Commission from the State that *this action is one against a legal entity distinct from the State,* and the State itself is only indirectly interested in the turnpike." (Emphasis added.)

The federal courts in Pennsylvania have on several occasions more recently held the Turnpike Commission of that state be a separate and legal entity subject to suit in the federal court. See *Darby* v. *DeFelice & Son, supra;*

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Lowes v. *Pennsylvania Turnpike Commission*, 125 F. Supp. 681; *Linger* v. *Pennsylvania Turnpike Commission, supra; Masse* v. *Pennsylvania Turnpike Commission*, D.C. E.D. Pa. 1958, 163 F. Supp. 510.

The West Virginia Turnpike Commission has also been ruled to be a citizen of the state of West Virginia for the purposes of federal jurisdiction. In *Guaranty Trust Co.* v. *West Virginia Turnpike Comm.*, 109 F. Supp. 286 (1952), suit was for the purpose of determining the authority of the defendant to construct a proposed highway. In determining that there was a diversity of citizenship the Court said, l.c. 292:

> "This is not an action against the State of West Virginia. If it were the court would clearly be without jurisdiction to entertain it. * * *"
>
> * * *
>
> "It is true that the act creating the Turnpike Commission contains the statement *that it is constituted an agency of the State, and that the exercise of its powers shall be deemed and held to be an essential governmental function of the State.* * * * The West Virginia Turnpike Commission was given no power to incur any liability on behalf of the State. No funds of the State are used by the Commission for any purpose. The bonds are not a pledge of the faith and credit of the State, but are payable exclusively from revenue produced from the operation of the turnpike. The Commission makes its own contracts and employs and fixes the compensation of its own personnel. The only noticeable differences between the West Virginia Act and that of Pennsylvania, 36 P.E. § 652a et seq., creating the respective turnpike commissions are, that in the West Virginia act the Commission is termed an 'agency' of the state and in Pennsylvania it is named as an 'instrumentality of the Commonwealth'; the West Virginia act requires the Commission to take title to lands in the name of the state, whereas, the

Pennsylvania act permits the Commission to take title in its own name; and in the West Virginia act the Commission was created for the purpose of constructing turnpikes generally, and therefore is not to go out of existence when the bonds issued for the present project have been paid; whereas, the Pennsylvania act provided for the dissolution of the Commission on retirement of the turnpike revenue bonds. In Pennsylvania the members of the Commission are paid salaries out of revenues derived from tolls; in West Virginia they serve without compensation. These differences are, in my opinion, unsubstantial and have no bearing on the question presented. *By the West Virginia act, as by the Pennsylvania act, the Legislature clearly intended to divorce the Turnpike Commission as fully as possible from any identity with the State, while giving it all the functions which are necessary and essential to the accomplishment of its purposes.* Fowler v. California Toll Bridge Authority, 9 Cir., 128 F.2d 549, and Kansas City Bridge Co. v. Alabama State Bridge Corp., 5 Cir., 59 F.2d 48, among the cases holding similar appointive boards or commissions to be arms of the state and therefore immune from suit, are found upon examination to turn upon circumstances of state control, function, power or interest which are not present among the attributes of the West Virginia Turnpike Commission." (Emphasis added.)

We would extend this argument unduly to comment upon the many decisions of our federal and state courts in which a Turnpike Authority or Commission has been held to be a separate and distinct entity and a "citizen" for the purposes of Federal jurisdiction. We do, however, set forth a number of these authorities.

West Virginia Turnpike Act:

Guaranty Trust Company v. *West Virginia Turnpike Commission, supra.*

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S. J. Groves & Sons Company v. *West Virginia Turnpike Commission*, (D.C., S.D., W.Va., 1958), 164 F. Supp. 816, 817.

Hope Natural Gas Company v. *West Virginia Turnpike Commission*, (1958), 105 S.E.2d 630.

Illinois State Toll Highway Act:

People v. *Illinois State Toll Highway Commission*, (1954), 3 Ill. 2d 218, 120 N.E.2d 35.

Indiana State Toll-Bridge Commission:

Indiana State Toll-Bridge Commission v. *Minor*, (1957), 236 Ind. 193, 200, 139 N.E.2d 445.

The New Jersey Highway Authority:

Taylor v. *New Jersey Highway Authority*, (1956), 22 N.J. 454, 126 A.2d 313, 322.

New Jersey Turnpike Authority v. *Parsons*, (1949), 69 A.2d 875, 879.

Missouri State Highway Commission:

State ex rel. Highway Commission v. *Bates*, 317 Mo. 696, 296 S.W. 418.

Michigan Turnpike Authority:

City of Dearborn v. *Michigan Turnpike Authority*, 1955 73 N.W.2d 344.

Ohio Turnpike Commission:

S. J. Groves & Sons Company v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7783, decided December 27, 1957.

Harrison Construction Company v. *Ohio Turnpike Commission*, 272 F.2d 337, decided December 3, 1959.

Johnson-Greene Company et al. v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7816 decided December 4, 1957.

George Vang, Inc., v. *Ohio Turnpike Commission*, D.C., E.D. being Civil Action No. 4584 decided July 31, 1956.

Maine Turnpike Authority:

In re Opinion of Justices, 80 A.2d 417.

South Carolina Public Service Authority:

South Carolina Public Service Authority v. *New York Casualty Co.*, 74 F. Supp. 831.

An excellent annotation appears at 147 A.L.R. 786 concerning this subject. A number of the cases cited above are discussed in this annotation. Particular attention is given to the "real party in interest rule."

The Authority cites the case of *Florida Turnpike Authority* v. *Van Kirk*, 146 F. Supp. 364, as authority for its contention that the Authority is not a "citizen." Upon careful reading of this case, it is readily distinguishable from the case at bar. The Court, in explaining its decision, stated:

> "In arriving at this conclusion the Court is aware that there are cases bearing on both sides of this controversy, but it is the opinion of this Court that in Florida there can be little or no question but that the Florida Turnpike Authority is definitely a part of the State and is the alter ego of the State because (1) the Legislature has so stated; (2) the Legislature has also stated that this board is to have exclusive control in this type of highway construction 'throughout' the State; (3) unlike local governmental units its authority embraces the whole state and affects the whole state and is not restricted to any one locality; (4) it is a 'state' agency entrusted with an undertaking which affects the 'whole' state; and (5) the Legislature has designated its duties as relates to condemnation by designating the area, direction, and counties

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through which the first turnpike is to be built and by reserving to itself the designation of all further turnpikes. So in effect we have the State Legislature telling one of its agencies to go out and condemn certain property and build the turnpike, and providing that members of that agency shall be appointed in the manner in which all other appointive state officials in Florida are appointed, except cabinet officers, namely, by the Governor, and providing the initial funds for the operation of the agency."

A number of the grounds relied upon by the Court in the above case are not present in the case at bar. The Legislature in Kansas has not stated that the Authority is a part of the State, it has not stated that the Kansas Turnpike Authority is to have exclusive control over this type of highway construction "throughout the state", and the Legislature has not designated the area, direction and counties through which the first turnpike project is to be built.

Notwithstanding the clear differences present in the Florida case and the case at issue, we submit the Florida case is not in accord with the overwhelming authority throughout the United States.

QUESTION III.

Was there substantial evidence before the trial court to support the judgment rendered in this action?

As pointed out earlier in this brief, we seriously question that this court will wish to concern itself with the question of the sufficiency of the evidence before the trial court and the construction placed upon the contract by the trial court.

The Circuit Court of Appeals carefully reviewed the record, heard extensive arguments of counsel and then

concluded that the judgment of the trial court was a correct one.

Brief comment will be made, however, with regard to the statements of Petitioner contained on pages 18 to 20 of Petitioner's brief.

It is observed that each of the sections of the specifications upon which Petitioner relies is a portion of the *Standard Specifications, rather than the Special Provisions or Supplemental Specifications,* except the first two sections set forth.

Comment will first be made upon Special Provision No. 5 (R. 60-61), a portion of which is cited by Petitioner. This section has to do exclusively with maintenance, and not the rebuilding of an embankment as was performed by the respondent. Furthermore, the section specifically enumerates the things that the grading contractor is required to do, as follows:

> "Until such maintenance has been transferred to or has been assumed by the paving contractor, *the grading contractor shall; mow the areas* on which grass, weeds or other vegetation is growing as often as may be necessary with a field mower, leaving a stubble height of about 5 inches; *restore any washouts or eroded portions* in cuts or fills; *remove any slides* and dispose of the material as directed by the Engineer; *keep the ditches open; maintain and remove all excess mud,* brush, weeds and other debris from drainage structures, entrance channels, catch basins and other structures or locations; all of which shall be done over the entire width of the right-of-way for the length of the Turnpike covered by the Contract." (R. 61) (Emphasis added).

It is clearly seen that this provision does not require the rebuilding of an embankment once properly construc-

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ted. *It deals solely with maintenance as distinguished from construction or re-construction.*

Supplemental Specification 8.2 (R. 62) set forth at page 19 of Petitioner's brief would appear to have no conceivable bearing upon the issues before this court.

Petitioner fails, however, to call attention to Standard Specification 5.4, which provides:

> "If there is a discrepancy between the Standard Specifications and the Supplemental Specifications or Special Provisions, the Supplemental Specifications and Special Provisions are to govern." (R. 88).

This section becomes of controlling importance when Section 20, Supplemental Specifications (R. 63-66), is examined. It is seen that a special set of new rules and regulations was provided for the compaction of earth work on this particular job. This Supplemental Specification cannot be overruled or over ridden by anything in the Standard Specifications. If there appears to be a conflict between Section 20 of the Supplemental Specifications and any of the provisions of the Standard Specifications, Section 20 must, of course, control.

When Section 20 of the Supplemental Specifications is read it is quickly seen that a contractor may be required to rework at his own expense an area properly constructed only when the yielding or soft spots are the result of (1) placing improper materials in the embankment, (2) failure to properly compact the embankment, or (3) failure to provide for surface drainage.

Petitioner does not contend that the additional work required following the rainfall was the result of any of these three conditions. Neither does the petitioner contend that the respondent was in any manner at fault.

This being true, Section 20 of the Supplemental Specifications clearly dictates that petitioner must pay for the additional work which the petitioner required respondent to perform.

CONCLUSION.

We state first of all, that no special or important reasons exist for the granting of a writ of certiorari. This is an ordinary action for the recovery of money and the questions involved are neither novel nor of great public interest.

The question of whether the Kansas Turnpike Authority is a "citizen" or "one of the United States" has been so frequently and consistently answered by the federal courts of this country that there would seem to be no reason for the Supreme Court of the United States to again examine the entire record of this proceeding.

The third question concerning the construction of the contract entered into between the parties is again nothing more or less than an ordinary dispute such as frequently arises between parties to a commercial transaction. This dispute has been resolved by the trial court and reviewed by the Tenth Circuit Court of Appeals. It would appear that no helpful purpose would be served by a further examination of the record by this court.

We respectfully submit that the petition for writ of certiorari should not be granted.

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